SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. ~~1171-1172~~ 81-82

THE UNITED STATES OF AMERICA,

Appellants,

vs.

THE WAYNE PUMP COMPANY, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

INDICTMENT No. 32597.

UNITED STATES OF AMERICA

vs.

THE WAYNE PUMP COMPANY, ET AL.

INDICTMENT No. 32598.

UNITED STATES OF AMERICA

vs.

THE WAYNE PUMP COMPANY, ET AL.

STATEMENT OF APPELLEES AS TO THE JURISDICTION OF THE SUPREME COURT TO REVIEW THE JUDGMENTS OF THE DISTRICT COURT ENTERED FEBRUARY 24, 1942.

I. Preliminary.

In compliance with Rule 12(3) of the Rules of the Supreme Court of the United States, appellees submit herewith their statement disclosing the grounds upon which they contend, that the judgments of the District Court sustaining appellees' demurrers to the above indictments

are not reviewable by the Supreme Court under the Criminal Appeals Act, as amended (18 U. S. C. § 682; 28 U. S. C. § 345).

Inasmuch as the District Court disposed of both indictments in one opinion, appellees are filing the same statement as to jurisdiction in each case.

II. The Indictments.

In view of the detailed construction and analysis of the indictments contained in the District Court's opinion, which is conclusive for present purposes, and to which reference is hereby made, no useful purpose would be served by an extended paraphrase of the indictments.

In Indictment No. 32597, appellees were charged with combining and conspiring "to fix, maintain and control arbitrary, artificial and non-competitive prices for the sale of computer pumps" in violation of Section 1 of the Sherman Act.

In Indictment No. 32598, appellees (except the Gasoline Pump Manufacturers Association and G. Denny Moore, its Secretary, not parties to such indictment) were charged with combining and conspiring to monopolize the manufacture and sale of computer pumps (count 1) and computing mechanisms (count 2) in violation of Section 2 of the Sherman Act.

Both computer pumps and computing mechanisms are covered by patents issued by the United States, the former being covered by the Jauch patent (the only patent identified in the indictments) owned by appellee, The Wayne Pump Company (Opinion, pp. 7, 14).

After setting forth the charges of combination and conspiracy generically, as above, each indictment (or count thereof) alleges that the combination and conspiracy thus

charged "is now described in further detail, that is to say." However, although the succeeding allegations enumerate a number of separate acts or means which are alleged to have been "a part of said combination and conspiracy" (Opinion, pp. 5-6), they do not allege or describe any understanding, agreement or consensual arrangement among the defendants. "In fact there is no allegation that there was any understanding or agreement among the defendants at all, aside from the allegation that they 'knowingly have entered into and engaged in a combination and conspiracy to fix and maintain non-competitive prices * * * ' ", etc. (Opinion, pp. 10-11).[1]

III. The Demurrers and the Court's Ruling Thereon.

The District Court correctly summarized the demurrers filed by appellees and the questions before that Court as follows (Opinion, p. 6):

> "The demurrers challenged the sufficiency of the indictments on the ground that *they fail to describe the alleged conspiracies and combinations* with which defendants are charged so as to inform them of the nature and cause of the accusations against them and enable them to properly prepare their defenses.
>
> The cases are before me now for disposition on these demurrers." [2]

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[1] The above statements concerning the indictments are taken from the opinion of the District Court. The summary of the indictments contained in the Government's statement as to jurisdiction departs widely from the construction adopted by the District Court, and is not accepted by appellees.

In fact, the Government's narrative representation that sundry charges were made in the indictments is calculated to produce the erroneous impression that those "charges" had been well pleaded. This begs the very question which was presented to and decided by the lower court, viz., whether or not those charges *were* well pleaded.

[2] All emphasis in this statement supplied, unless otherwise noted.

Such construction of the demurrers, which would in any event be conclusive, was concurred in by Government counsel in the court below.[3]

The basis of the District Court's decision sustaining the demurrers is stated in the last two paragraphs of its opinion as follows (Opinion, p. 14):

> "It is fundamental that in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense. Having in mind that the subject matter of the instant indictments is protected by a patent, I am of the opinion that the defendants here have not been furnished with such definite and particular allegations of fact as will meet this test. The charges are much too general. *They do not adequately describe the nature of the alleged unlawful conspiracy(,) agreements or arrangements which defendants are accused of having made, nor show how the defendants became parties thereto, nor how they collaborated in doing the unlawful things; nor set out any unlawful means whereby the unlawful objectives were accomplished.*
>
> Believing as I do, for the reasons heretofore stated, that the indictments are insufficient, the demurrers thereto will be sustained."

The Court's ruling was thus directly responsive to the sole ground of appellees' demurrers, to-wit: that the in-

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[3] In the oral argument on the demurrers, counsel for the United States said at p. 121 of the stenographic transcript of the hearing:

> "These demurrers raise but one issue. . They claim that these indictments do not inform the defendants of the nature and cause of the accusation brought against them; in other words, that their rights under the Fifth and Sixth Amendments have been violated."

Again, at p. 140:

> "But the defendants have chosen their issue, and they have boiled it down to a single question of whether the defendants can prepare their defense on the basis of the facts alleged in these indictments."

dictments failed to describe with definiteness and certainty the combination and conspiracy constituting the offenses charged therein.

IV. **The Principles Determining This Court's Jurisdiction.**

In so far as here material, the Criminal Appeals Act provides as follows:

> "A writ of error may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
>
> From a decision or judgment * * * sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the * * * construction of the statute upon which the indictment is founded. * * *" (18 U. S. C. A. § 682).

The decisions of this Court construing the portion of the Criminal Appeals Act quoted above establish the following propositions:

(1) The right of appeal which is given to the Government thereby is "exceptional" and "strictly limited to the instances specified".

U. S. v. *Borden Co. et al.*, 308 U. S. 188, 192;
U. S. v. *Keitel*, 211 U. S. 370, 399.

(2) Appeal does not lie from a judgment which rests on indefiniteness, vagueness or other deficiencies of an indictment as a pleading, as distinguished from a construction of the statute which underlies the indictment.

U. S. v. *Borden Co. et al.*, 308 U. S. 188, 193.

(3) Nor does appeal lie in a case where the District Court has considered the construction of the statute, but has also rested its decision upon the independent ground of a defect in pleading. In such a case, this Court "cannot disturb the judgment below and the question of construction [of the statute] becomes abstract."

U. S. v. *Borden Co.*, 308 U. S. 188, 193;
U. S. v. *Hastings*, 296 U. S. 188, 193.

(4) Where, as here, jurisdiction is invoked on the ground that the decision below was based upon a construction of the statute upon which the indictment was founded, it must *affirmatively* appear that the decision below was based on that ground and that ground alone. This Court is not called upon to search the record in order to ascertain whether the action of the court below *might* have been so predicated. In the absence of a clear expression that such was the ground of decision, appeal does not lie. All doubts and ambiguities are to be resolved against appellate jurisdiction.

U. S. v. *Carter*, 231 U. S. 492, 493-4;
U. S. v. *Moist*, 231 U. S. 701, 702, 703;
U. S. v. *Halsey, Stuart & Co.*, 296 U. S. 451, 452;
U. S. v. *Hastings*, 296 U. S. 188, 193.

(5) This Court must accept the construction given to the pleadings by the court below.

U. S. v. *Borden Co.*, 308 U. S. 188, 193.

V. The Grounds on Which Appellees Contend That This Appeal Does Not Lie.

The District Court unquestionably decided the sole issue which was presented by the demurrers—that the indictments as a whole failed to describe the alleged conspiracies and combinations with sufficient definiteness and certainty to inform appellees of the nature and cause of the accusations against them. As the appellees interpret the opinion of the District Court, that was the only ground on which its judgment sustaining the demurrers was based. But whether or not such was the sole ground of decision, it was certainly the primary, and an independent, ground thereof. That being the case, whether the Court also decided any other question is wholly immaterial to a consideration of the right of the United States to appeal. The Government would be entitled to appeal only if it made a clear showing that the judgments below were based solely on a construction of the Sherman Act. This it has not done, and cannot do.

VI. The District Court's Decision.

As appears on the face of the demurrers, and from the portion of the District Court's opinion quoted above, the appellees in the court below challenged the indictments on the fundamental ground that they failed to advise them, as required by the Fifth and Sixth Amendments to the Constitution, of the nature and cause of the accusations against them. That challenge was not, as suggested in appellant's statement as to jurisdiction, a formal or technical one, but raised the vital and substantial point that the charges of combination and conspiracy made in the indictments were so generic and so lacking in factual and identifying information that the defendants were left completely in the dark as to the offenses intended to be charged. In other words, the fundamental challenge made by defendants was that although the indictments charged in conclusory terms that the defendants had engaged in a combination and conspiracy to fix prices on computer pumps and to monopolize computer pumps and computing mechanisms, there was a complete lack of identifying facts adequately describing the nature, character and terms of those conspiracies.

As pointed out by the court below (Opinion, p. 14), it is "fundamental that in every indictment the defendant is entitled to be informed with such definiteness and certainty of the accusations against him as will enable him to make his defense, and avail himself of acquittal or conviction in any further prosecution for the same offense". Where, as is true of the Sherman Act, the offense is described in the statute in general terms, it is not sufficient for the indictment to charge a violation in the generic language of the statute. It must descend to particulars by apt averments of fact. Since the requisite degree of particularity thus varies with the nature and character of the crime intended to be charged, the necessity of definite aver-

ment is commensurately increased when a charge of conspiracy to restrain trade or monopolize is made with respect to articles of commerce which are themselves the subject matter of the grant of a perfectly legitimate, though limited, monopoly, to-wit: a patent monopoly, the protection or exploitation of which permits the patentee to impose certain terms and conditions on licensees pursuant to license agreements. Or, as stated by the court below (Opinion, p. 14), approach to the challenge leveled by appellees at the indictments had to be made "having in mind that the subject matter of the instant indictments is protected by a patent * * *".

An examination of the District Court's decision discloses that the court never lost sight of the fundamental issue that was before it—the sufficiency of the factual averments as to the combinations and conspiracies charged. Again and again the Court applies to the allegations of the accusatory portions of the indictments the tests of certainty, definiteness and understandability. What do the averments mean? Do they identify to the defendants what the intended charges are? Do they disclose an understanding or agreement? These, and other like inquiries, have to do solely with the sufficiency of the indictments as pleadings. They have nothing whatever to do with substantive questions involving a construction of the Sherman Act.

All told, during its consideration of the indictments, the District Court *ten* separate times calls attention to the absence of clarity and identifying facts in the indictments.

The Court first points out that the indictments charge the appellees with "'using the Jauch patent' for the purpose of fixing prices among themselves on the sales of computer pumps and * * * restricting the manufacture and sale of such pumps". This charge, singled out for comment in appellant's Statement as to Jurisdiction (pp. 4, 5), is the introductory allegation in the paragraphs averring

"means" which were "parts" of the conspiracies complained of, and from the context of the Court's opinion is obviously one to which great importance was attached by the Government. But, the Court remarks (Opinion, p. 10), "what is meant by the phrase 'use the Jauch patent' is not quite clear". Nor does the indictment, says the Court:

> "allege that there was any *understanding or agreement* among the defendants to use the patent to fix prices on any unpatented article. In fact, there is no allegation that there was any understanding or agreement among the defendants at all, aside from the allegation that they 'knowingly have entered into and engaged in a combination and conspiracy to fix and maintain non-competitive prices and to monopolize the manufacture and sale of computer pumps and computing mechanisms, by the doing of the things set out.'"

The trial court thus plainly condemns the primary allegations of means for their failure to particularize, to specify, to identify, so that defendants may know the nature of the charges against them. This significant conclusion of the District Court is stated at page 11:

> "The difficulty is that the Government fails to set out any *identifying facts* to show that the Wayne Pump Company and its licensees did anything more than the law permitted them to do under the monopoly granted by the patent. *How they took joint action or entered into joint agreements to use the Jauch patent to achieve alleged illegal objectives, or how they went outside the monopoly granted to the patentee and its licensees, is nowhere set out in the indictment.*"

The trial judge could not have indicated more clearly that he was condemning the indictments because of their vagueness and indefiniteness—their failure to set forth "identifying facts" which would advise appellees of the nature and cause of the accusation against them.

In discussing the next group of allegations relied upon by the Government, the Court's inquiry is again directed to the lack of clearness and the absence of identifying facts in such averments. One of the allegations, the Court points out (Opinion, p. 11), was that appellees attempted to compel the Neptune Company to submit all patents owned or controlled by it to "uses determined by Wayne". As to that averment, the Court says:

> "Again it is not clear what is meant by the allegation that defendants attempted to compel Neptune to submit all patents owned or controlled by it on computer pumps 'to uses determined by Wayne.'"

The related averment that defendant Wayne Company approached gasoline pump manufacturers, who had purchased computing mechanisms from Neptune and other manufacturers, and attempted to induce them to accept licenses under the Jauch patent, is disposed of in the same manner. Says the Court (Opinion, p. 12):

> "If in attempting to induce these manufacturers to accept such licenses, the Wayne Company, or any other of the defendants, made use of unlawful means, then those *facts* should be set out in the indictments."

The Court then discusses the allegations that appellees Veeder, G. & B. and Tokheim acknowledged the validity of the Jauch patent. Again the Court points out that (Opinion, p. 12):

> "If any unlawful means were used in securing this acknowledgment, then the indictments should set them out clearly enough for defendants to meet these charges."

The Court then refers to the charge that as one of the means for the effectuation of the alleged price-fixing and conspiracy, appellees determined jobber resale prices for computer pumps and refused to sell to those jobbers not

adhering to such prices (Opinion, p. 12). The Court recognizes the well settled law that attempts to regulate resale prices of patented articles, after a complete sale by the owner, are unlawful, but finds that the defect in the indictments is their failure to allege *facts*, saying (Opinion, p. 13):

> "However, *no facts* are set out to show that the Wayne computer pumps were sold through jobbers, nor are the names of any specific jobbers given with whom these defendants carried on negotiations wherein the resale price of computer pumps were determined."

After referring to and quoting at length from the case of *United States* v. *Colgate*, 253 Fed. 522, in which the absence of such allegations was held to have rendered an indictment defective for indefiniteness (Opinion, p. 13), the trial court sums up its findings on the subject of resale price maintenance as follows:

> "So in the case at bar, if these conditions exist, the Government should have no difficulty in setting forth at least one specific instance of where defendants determined the resale price at which jobbers might sell computer pumps. If this condition does exist, surely the Government must be in possession of the facts, and *they should be set out in the indictments, so as to reasonably inform defendants of the offenses with which they are charged.*"

Again it is apparent that the Court was deciding only that the indictments failed to allege sufficient facts—failed as a matter of pleading to comply with the requirement of the Sixth Amendment to the Federal Constitution.

The Court concludes its seriatim discussion of the allegations of the indictments by considering the contention of the Government with respect to the asserted aggregation of competing patents on computer pumps and computing mechanisms. The importance attributed by the Government to this subject is emphasized by the comment thereon

in its Statement as to Jurisdiction (pp. 4, 5). Here again the trial court does not consider the substantive question of whether or not, if competing patents were involved, the indictments would charge an offense under the Sherman Act, but discusses what facts are disclosed by the indictments as to the asserted existence and aggregation of such patents. The Court points out that the indictments (Opinion, p. 13):

> "*set out no facts* whereby *to identify* these competing patents, *nor in what manner nor by whom* such monopoly in them was acquired."

Again (Opinion, p. 14):

> "the indictments *are silent* as to the identity of the other patents aside from the Jauch patent issued in November, 1932."

From the foregoing resume of the comments of the Court in its seriatim analysis of the allegations of the indictments, one and only one central theme emerges, namely, that such allegations and the indictments as a whole are devoid of identifying facts sufficient to apprise the appellees of just what charges are intended to be made against them. This is made clear when the Court focuses its attention on the accusatory portions of the indictments *as a whole*, and in the concluding paragraphs of its opinion (quoted in full on page 3 of this statement) sums up the pleading deficiencies of the indictments.

Furthermore, the trial court finds that the indictments lack those essential averments without which no conspiracy indictment can stand against demurrer—a factual allegation of the consensual arrangement which constitutes the alleged combination or conspiracy. Addressing itself to this fatal defect in the pleadings, the District Court said (Opinion, p. 10):

> "• • • *there is no allegation that there was any understanding or agreement among the defendants at*

> *all*, aside from the allegation that they 'knowingly have entered into and engaged in a combination and conspiracy to fix and maintain prices and to monopolize the manufacture and sale of computer pumps and computing mechanisms, by the doing of the things set out.'"

And so, the Court concludes (Opinion, p. 14):

> "The charges are much too general. They do not adequately describe the nature of the alleged unlawful conspiracy [,] agreements or arrangements which defendants are accused of having made, nor show how the defendants became parties thereto, nor how they collaborated in doing the unlawful things . . ."

How, we respectfully ask, can it be contended that the District Court did not rest its decision upon a question of pleading, when the Court in plainest terms found the indictments as a whole fatally defective in factual averments of the conspiratorial arrangement?

The Government in its Statement as to Jurisdiction (p. 6) attempts to explain the repeated references by the District Court to the indefiniteness and uncertainty of numerous averments of the indictments, as well as the Court's final conclusion (Opinion, p. 14) that the indictments as a whole were too general, conclusory and lacking in factual allegations as to conspiracy by saying:

> "It seems clear that the court, in stating that certain allegations were insufficient in form, meant that if those allegations were intended to charge *anything beyond what the court found to be exempt from the Sherman Act by reason of the patent privilege*, the allegations fail to do so in clear and certain terms."

This position is completely disproved by what the District Court said in considering the indictments as a whole (Opinion, p. 14) with respect to their averments as to combination and conspiracy. The Court does not there consider merely charges "beyond what the Court found to be

exempt from the Sherman Act" but finds each indictment "too general" with no adequate description of "the nature of the alleged unlawful conspiracy [,] agreements or arrangements" or any showing as to "how the defendants became parties thereto nor how they collaborated in doing the unlawful things". These are all purely pleading questions, going to the sufficiency of the whole indictment and in no respect dependent upon what the Court might consider that defendants could or could not do within the scope of patent laws.

The more searching the analysis of the opinion of the District Court the more plain does it become that the one issue which the Court intended to decide and did decide was that presented by the demurrers, namely: the sufficiency of the indictments as criminal pleadings. True, in the course of his opinion and by way of determining what the pleadings intended to charge the defendants with having conspired to do, the trial court made certain observations concerning the substantive law. The Court was trying to find out whether the grand jury intended, for instance, to charge the defendants merely with entering into the usual patent license agreements or whether the indictments were intended to charge something more.

The District Court must have concluded that the offense intended to be charged could not have been merely the doing of what this Court in numerous decisions has said a patent owner and his licensees may lawfully do, but that the indictments must have intended to charge more than merely engaging in lawful patent licensing activities.[4] What that

[4] Indeed, it was frankly conceded by Government counsel on the argument of the demurrers that the Government was not relying on the illegality of the patent license agreements in this case. Counsel said (p. 143, Transcript of Argument):

> "It is not the case of "A" licensing "B". It is not the case of "A" then licensing "C", two independent actions. • • • There is no allegation here that the licensor imposed a price, a price schedule, on its licensees."

"more" was, however, the indictments failed with clearness and certainty to disclose. Obviously, if the Court was to give realistic and intelligent consideration to appellees' contention that the indictments did not reasonably define the material issues which they must prepare to meet at the trial, it was but natural and proper for it to consider those acts which were within the accepted and normal activities of licensors and licensees for whatever light such consideration threw upon the clarity and definiteness of the pleadings. The point is, however, that such consideration was in no sense a determination of any controverted questions of substantive law. The trial court was properly exercising its informed judgment in appraising the pleading issues, and its consideration of the substantive law was merely a part of the background in the light of which the Court determined the disputed questions of criminal pleading before it.

Whether, in the abstract, the observations of the District Court on the substantive law were technically correct or incorrect, therefore, is immaterial to a determination of the Government's right to appeal herein. Nor is it material whether the court was right or wrong in the process of reasoning by which it arrived at its conclusion that the indictments were bad as a matter of pleading. The only question here is whether, on a fair reading of the District Court's opinion, it can be said that the Government has sustained the burden of showing clearly that the orders of that court were based solely upon a construction of the Sherman Act—an issue which was not even before the court.

The Government's Jurisdictional Statement implies that the burden rests on appellees to establish that the District Court based its decision on the "independent ground of indefiniteness", and that the decision is subject to review by this Court, unless it "can be said" that the ground of the

District Court's decision, that the indictments were fatally defective as pleadings, was an "independent" ground.

This is a misconception of the declared principles governing this Court's review. The burden rests on the Government to establish that the District Court's decision was based on a construction of the Sherman Act. *U. S.* v. *Carter*, 231 U. S. 492; *U. S.* v. *Moist*, 231 U. S. 701. If it does not "clearly appear" that it *was* so based, then, as held in the above cases, jurisdiction does not exist.

The question whether there is an "independent" ground of decision cannot arise unless and until it first appears that the decision certainly *rests* on the ground of a construction of the Sherman Act, and *also* rested, or may also have rested, on another ground not open to review by this Court. *U. S.* v. *Hastings*, 296 U. S. 188. Government counsel do not claim there were *two* grounds here; their claim is that there was only one ground on which the decision was *"based"*, but they contend that that ground was a construction by the District Court of Sections 1 and 2 of the Sherman Act.

Viewing the opinion in the light most favorable to the Government, the best that can be said is that the observations of the court as to the law of the Sherman Act deprive the opinion of being one hundred per cent a matter of pleading and, therefore, make it doubtful that the District Court's decision was based on that ground. That, however, is not enough to establish the jurisdiction of this Court when the test of such jurisdiction is that the statutory construction basis of the decision must "clearly appear".

The Government's suggestion that the sole ground upon which the court below rested its decision was a construction of the Sherman Act is truly extraordinary, when it is borne in mind that the court's opinion clearly discloses (1) that the court understood that it was deciding the sufficiency of the indictments as pleadings and so stated,

and (2) that that was the sole issue presented to the District Court for determination. No decision of this Court has been found, and we apprehend there is none, to the effect that a decision by a lower court upon a question of substantive law not before it for consideration gives this Court jurisdiction to review the case under the Criminal Appeals Act, despite the fact that the District Court has considered and passed upon the sufficiency of the indictment as a pleading.

The basis of the rule that appeal does not lie unless the lower court has based its decision solely upon the construction of the statute on which the indictment is founded is that, if the judgment also rests upon a ground of criminal pleading adequate to support it, this Court could not reverse the judgment below, whatever its construction of the statute. It is plainly demonstrable from the analysis of the opinion above set forth that the vagueness and indefiniteness of the indictments was the primary, if not the only, ground of decision below, and that the court's holding thereon was plainly adequate to support its judgment. The District Court repeatedly passed on questions of pleading, going to the heart of the indictment, sufficient to support its decision sustaining the demurrers, and which this Court could not disturb, under the rule of the *Hastings* and *Borden* cases, *supra*, if it entertained appeal and construed the Sherman Act. To recapitulate in this regard, the District Court expressly ruled:

(1) That the charges in the indictment as a whole were much too general;
(2) That the allegations therein did not adequately describe the nature of the alleged conspiracy, nor how the appellees became parties thereto or collaborated pursuant thereto;
(3) That there were no clear or definite allegations describing the allegedly competing patents allegedly aggregated by appellees;

(4) That there were no clear and definite allegations identifying the manner of aggregation or the appellee aggregating the same;
(5) That there were no specific and definite allegations describing facts necessary to enable appellees to prepare for trial in respect of the charge of resale price maintenance;
(6) That there were no facts identifying the nature of the charge in respect of acknowledgment of validity of the Jauch patent;
(7) That there were no clear and definite allegations concerning the charge of inducement of other manufacturers to accept patent licenses;
(8) That the purport of the charge that the defendants had attempted to compel Neptune to submit all patents owned or controlled by it "to uses determined by Wayne" was not clear; and
(9) That the most important charge of intended means for effectuation of the alleged conspiracy, to-wit: that the appellees had used the Jauch patent for the purpose of fixing prices among themselves or monopolizing, was ambiguous and lacking in the particularization necessary to permit the appellees adequately to prepare for trial.

The foregoing ambiguities cover the entire range of the allegations of both indictments, as well as the heart thereof, to-wit: the basic charge of conspiracy, to which all other allegations are subsidiary, and around which the entire indictment is constructed. How, in the light of such determinations by the trial court, binding on this Court under its previous decisions, review by this Court of the abstract statements of the patent—anti-trust law background would serve any useful purpose is not suggested by the Government in its jurisdictional statement. We must respectfully submit, moreover, in the light of such review, that the Government's contention that vagueness and indefiniteness

was not, at the very least, a primary and independent ground of decision by the court below is wholly without foundation. The appeals should be dismissed.

Respectfully submitted,

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